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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re ELIJAH L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ELIJAH L., Defendant and Appellant.	A152479 (Contra Costa County Super. Ct. No. J16-01167)

At a contested jurisdictional hearing, the court sustained allegations in a delinquency petition that minor had committed forcible rape and forcible oral copulation. The juvenile court entered a dispositional order placing minor on probation for 10 years subject to various terms and conditions. On appeal, minor requests that this court independently review the victim's school disciplinary records, which were produced pursuant to a subpoena duces tecum and reviewed by the juvenile court in camera, to determine whether the juvenile court properly exercised its discretion in denying minor's request to release the documents. The Attorney General does not oppose the request. Having reviewed the records, we find no abuse of discretion in the court's refusal to release the records.

Minor also contends three of the conditions of probation are unconstitutionally vague and overbroad and offers modifications to cure the defects. The Attorney General agrees that the conditions are vague and offers additional modifications to cure the defects. We adopt some of the proposed modifications and agree that, as modified, the

constitutional concerns are ameliorated. Accordingly, we shall modify the conditions and affirm the order in all other respects.

Factual and Procedural Background

On December 21, 2016, a juvenile wardship petition (Welf. & Inst. Code, § 602, subd. (a)) was filed alleging that minor committed forcible rape (Pen. Code,[1] § 261, subd. (a)(2)) and forcible oral copulation (former § 288a, subd. (c)(2), now § 287, subd. (c)(2) by Stats. 2018, ch. 423, § 49).

Prior to the jurisdictional hearing, minor filed a subpoena duces tecum requesting the victim's school records on the ground that the records "contain information that is relevant, material, and necessary to issues in this action." The school filed a motion to quash the subpoena and for a protective order limiting dissemination of the requested documents. At a hearing on his motion, minor narrowed his request to the victim's disciplinary records. He argued that the records were relevant because the outcome of the contested jurisdictional hearing would likely turn on credibility determinations. The juvenile court agreed that instances of moral turpitude found in the victim's disciplinary record would be relevant. The prosecutor suggested, and minor agreed, that the court should review the victim's disciplinary records to determine if they contained any information relevant to the proceeding. The court reviewed the records in camera and found that they did not contain any relevant information. Accordingly, the trial court ordered the records sealed.

Following the contested jurisdictional hearing, the juvenile court sustained the petition as alleged.[2] Thereafter, the juvenile court declared minor a ward and placed him on probation for 10 years, subject to numerous conditions. Minor timely filed a notice of appeal.

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[1] All statutory references are to the Penal Code unless otherwise noted.

[2] Given minor's arguments on appeal, we need not recite the facts as presented at the jurisdictional hearing. Minor does not challenge the sufficiency of the evidence to support the court's findings.

Discussion

1. The Victim's School Records

The parties agree that our review of the victim's sealed school records is appropriate. (See *People v. Hobbs* (1994) 7 Cal.4th 948, 975 [where sealed materials are reviewed in camera, "a sealed transcript of the in camera proceedings, and any other sealed or excised materials, should be retained in the record . . . for possible appellate review"]; *People v. Prince* (2007) 40 Cal.4th 1179, 1285 [On appeal, courts "routinely independently examine[] the sealed records of such in camera hearings to determine whether the trial court abused its discretion in denying a defendant's motion for disclosure."].) Having independently examined the sealed records, we find no error in the court's denial of minor's motion for disclosure. As the court reported, the records contain no relevant material.

2. Probation Conditions

The court initially imposed the probation condition that minor not use or possess pornography. Subsequently, the court adopted a case plan that imposes several additional probation conditions. Condition number 18 prohibits minor from using or possessing any "sexually explicit images in any medium." Condition number 15 requires minor to submit his "cell phone or other electronic devices under [his] control to a search of any medium of communication reasonably likely to reveal whether [he is] complying with the terms of [his] probation, with or without a search warrant, at any time of the day or night. Such media of communication include text messages, . . . photographs, . . . but do not include Web sites, Internet sites, or social media sites, except for sites related to pornographic material or sites particular to sexually explicit material. This provision includes SnapChat. Minor to provide probation or peace officer with any passwords necessary to access the information specified."

Minor contends the terms "pornography" and "sexually explicit" images or material, as used in the above conditions, are unconstitutionally vague and do not provide fair warning about the prohibited conduct, nor permit the juvenile court to intelligently determine if any of the three conditions has been violated. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 ["A probation condition 'must be sufficiently precise for the

probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness."].) He also contends that the prohibition on sexually explicit materials and the related electronic search condition are unconstitutionally overbroad because they prohibit the use or possession of books or movies that may not be considered pornography but merely include some sexually explicit content. (See *In re Victor L.* (2010) 182 Cal.App.4th 902, 910 [A condition of probation is unconstitutionally overbroad if it (1) "impinge[s] on constitutional rights," and (2) is not "tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation."].)

Minor suggests the defects can be cured by striking condition number 18 as redundant of the pornography condition and by striking the reference in the electronic search probation condition to "sites that are particular to and specific to sexually graphic or explicit materials" as redundant to the phrase "sites that are related to some type of pornographic material." He further suggests that the following definition of pornography be added: " 'As used herein, "pornography" or "pornographic materials" means materials depicting obscene matter as described in . . . section 311, subdivision (a).' "[3]

[3] Subdivision (a) of section 311 defines "obscene matter" as meaning "matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value. [¶] (1) If it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group. [¶] (2) In prosecutions under this chapter, if circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, this evidence is probative with respect to the nature of the matter and may justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value. [¶] (3) In determining whether the matter taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor that may be considered in making that determination."

The Attorney General agrees that the terms "pornography" and "sexually explicit" materials are subject to interpretation, and that reasonable minds may disagree about what constitutes either "pornography" or "sexually explicit" images or material. (See *In re D.H.* (2016) 4 Cal.App.5th 722, 728 [The term "pornography" is subjective and " 'lacks any recognized legal definition.' "].) The Attorney General also agrees generally with minor's proposed modifications. The Attorney General suggests, however, that pornography and pornographic materials should be defined more broadly to include subdivisions (b) through (h), as well as subdivision (a) of section 311.[4]

[4] Subdivisions (b) through (h) of section 311 read: "As used in this chapter, the following definitions apply: [¶] . . . [¶] (b) 'Matter' means any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction, or any other article, equipment, machine, or material. 'Matter' also means live or recorded telephone messages if transmitted, disseminated, or distributed as part of a commercial transaction. [¶] (c) 'Person' means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity. [¶] (d) 'Distribute' means transfer possession of, whether with or without consideration. [¶] (e) 'Knowingly' means being aware of the character of the matter or live conduct. [¶] (f) 'Exhibit' means show.[¶] (g) 'Obscene live conduct' means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest and is conduct that, taken as a whole, depicts or describes sexual conduct in a patently offensive way and that, taken as a whole, lacks serious literary, artistic, political, or scientific value. [¶] (1) If it appears from the nature of the conduct or the circumstances of its production, presentation, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the conduct shall be judged with reference to its intended recipient group. [¶] (2) In prosecutions under this chapter, if circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the conduct and may justify the conclusion that the conduct lacks serious literary, artistic, political, or scientific value. [¶] (3) In determining whether the live conduct taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the live conduct depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor that may be considered in making that determination. [¶] (h) The Legislature expresses its approval of the holding of People v. Cantrell [(1992)] 7 Cal.App.4th 523, that, for the purposes of this chapter, matter that 'depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct' is limited to visual works that depict that conduct."

Minor concedes that the definition of "matter" in subdivision (b) is relevant and would provide additional clarity. He opposes inclusion of the remaining subdivisions as adding unnecessary confusion and potentially enlarging the scope of the condition beyond what was intended by the court. We agree that prohibiting minor from possessing obscene matter as described in subdivisions (a) and (b) of section 311 cures the constitutional defects and is consistent with the court's intention to prohibit minor from viewing obscene content "in any medium." Nothing in the record suggests that the court was concerned with minor's observation of "obscene live conduct" as defined by subdivision (g) of section 311. Our modification, however, is without prejudice to the juvenile court making further modifications to the condition that it may deem advisable. In considering further modifications of the condition, the juvenile court "should consider the purpose that this condition is intended to serve, in the context of his other probation conditions, and how it may be tailored to best help [minor] avoid repeating his offense or generally aid in his rehabilitation." (*In re M.F.* (2017) 7 Cal.App.5th 489, 496.)

Disposition

The condition prohibiting minor's possession of pornography and condition number 18 are stricken and replaced with a new condition number 18 as follows: "Minor may not use or possess materials depicting obscene matter as described in Penal Code section 311, subdivisions (a) and (b)." Condition 15 is modified to read, "Minor shall submit cell phones or other electronic devices under his control to a search of any medium of communication reasonably likely to reveal whether he is complying with the terms of probation, with or without a search warrant, at any time of the day or night. Such media of communication include SnapChat, text messages and photographs, but do not include Web sites, Internet sites, or social media sites, except for sites related to materials depicting obscene matter as described in section 311, subdivisions (a) and (b). Minor to provide probation or peace officer with any passwords necessary to access the information specified." In all other respects the judgment is affirmed.

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POLLAK, P. J.

WE CONCUR:

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STREETER, J.

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TUCHER, J.

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